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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

SYLVIA PAYASLYAN et al.,

Plaintiffs and Appellants,

v.

THE MAY DEPARTMENT STORES
COMPANY etc.,

Defendant and Respondent.

B164162

(Los Angeles County
Super. Ct. No. EC030351)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura A. Matz, Judge. Affirmed.

Wasserman, Comden, Casselman & Pearson, Mark S. Gottlieb and Julia Azrael for Defendant and Respondent.

Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon for Plaintiffs and Appellants.

INTRODUCTION

Plaintiff and appellant Sylvia Payaslyan was struck on her left arm by a display in a store owned by defendant and respondent The May Department Stores Company, doing business as Robinsons-May (Robinsons-May). Ms. Payaslyan and her husband, plaintiff and appellant Varouzhan Payaslyan, sued. The jury awarded Ms. Payaslyan \$535,000 for economic damages and \$100,000 for non-economic damages. Also, Mr. Payaslyan was awarded \$10,000 for non-economic damages.

On appeal, the Payaslyans contend the economic damage award must be reversed on the ground that a chart regarding the cash value of future economic loss was not attached to a jury instruction. The Payaslyans also contend the non-economic damage awards were inadequate, as a matter of law.

These contentions are unpersuasive. Thus, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *The accident.*

At the time Mr. and Ms. Payaslyan became engaged in 1989, they started a photography store. In 1993, they opened a second store. They had four children.

On October 8, 1999, two days before Ms. Payaslyan's 31st birthday, she went to a Robinsons-May department store. A display fell and struck Ms. Payaslyan's left upper arm, leaving a red mark or bruise about the size of a quarter. A security guard offered Ms. Palaslyan ice for swelling. Ms. Payaslyan is right-handed.

b. *Witnesses for the Payaslyans.*

The Payaslyans presented a number of witnesses, including physicians, friends and neighbors, to support their position that the accident had totally changed Ms. Payaslyan, her life and the life of her husband. The witnesses testified that the accident transformed Ms. Payaslyan from a happy productive woman into a debilitated person consumed by pain. The Payaslyans asserted that as a result of the accident Ms. Payaslyan's left arm became virtually nonfunctional. Their evidence included the following.

Immediately after the accident, Ms. Payaslyan had severe pain. Four days later, she saw a chiropractor. For years following the accident, Ms. Payaslyan received treatment from a number of physicians and other medical practitioners. Within time, the pain migrated down her arm to her hand and eventually to her shoulder, face, left leg, vagina and breast. The pain eventually forced her to walk with a cane.

Ms. Palaslyan was in constant pain and could no longer manage her household, clean, make beds, bathe her children, or wash dishes. Slight touching hurt her, even when she tried to hug her children. Ms. Payaslyan could no longer work in one of the photography stores. Her inability to partake in family activities caused a sense of worthlessness. The joy vanished from her life and she became depressed.

As a result of the accident, Ms. Payaslyan developed reflex sympathetic dystrophy (RSD), commonly referred to as a complex regional pain syndrome. It was an extremely painful, chronic, progressive, incurable nerve disorder. The disease was characterized by a dull, aching, throbbing, burning, sore bruise-like pain that could radiate from one part of the body to another. Over time, Ms. Payaslyan's left arm became largely nonfunctional and she was in extreme pain. She had a number of injections trying to alleviate the pain and at the time of trial was taking a number of medications.

Ms. Payaslyan's life expectancy was 48 years. Ms. Payaslyan incurred medical expenses of \$163,348.83, which were reasonable and necessary. According to a nurse specializing in case management rehabilitation, the cost of Ms. Payaslyan's future medical care would be \$2,029,556.18. This sum was in "today's dollars and not a present net value."

All physical intimacy between Ms. Payaslyan and her husband stopped because of Ms. Payaslyan's pain. Mr. Payaslyan and a housekeeper were forced to care for the children. Mr. Payaslyan was deeply saddened at watching his wife's health deteriorate and was being treated by a physician.

c. Witnesses for Robinsons-May.

Robinsons-May asserted that the Payaslyans exaggerated Ms. Payaslyan's injuries and her expected future medical needs. Evidence submitted by Robinsons-May included the following.

Investigators conducted several hours of surveillance and made sub rosa surveillance tapes, which were played for the jury. The tapes showed Ms. Payaslyan using her left arm to open and close a SUV door, drive, tie her son's shoes, hold a cellular phone, and hold a cane. The tapes also showed her working in one of the photo stores, putting the cane in a shopping cart full of merchandise and then pushing the cart, hugging a child, and walking down the street as she switched the cane from left hand to right hand.

Limbs stricken with RSD and limbs that are nonfunctional atrophy over time, i.e., they wither and decrease in size. Ms. Payaslyan's arm was not atrophied.

Dr. Clayton Varga testified for the defense. According to Dr. Varga, Ms. Payaslyan was in pain and did exhibit some pain behavior. However, she did not have classic, full-blown RSD. Further, Dr. Varga testified that Ms. Payaslyan's complaints were exaggerated behaviors and she was malingering. Dr. Varga also testified that he had reviewed the videotapes, Ms. Payaslyan's actual conduct was inconsistent with her assertion that her left arm was largely nonfunctional, there was a huge discrepancy between the observed behavior and the reported behavior, and there was no evidence of irreversible damage.

Ms. Payaslyan's own physician testified that when Ms. Payaslyan was not aware of being watched, she "was observed to move the arm and hand well and could execute fine motor tasks with ease" A dentist hired by the Payaslyans had explained to Ms. Payaslyan that he doubted the RSD diagnosis, but believed she had simple myofascial pain, as she was able to move her arm which she was not protecting.

Mr. Payaslyan was discredited at trial. For example, in his deposition, he testified that his wife could *not* do a number of activities, including cut her own food, use her left

arm to drive, take their children to school, or hold a cane in the left hand. The video tapes showed Ms. Payaslyan doing all of these activities, and others.

2. Procedure.

In October 2000, the Payaslyans filed a lawsuit against Robinsons-May for negligence, premises liability, and loss of consortium. Prior to trial, Robinsons-May admitted duty and breach, but denied causation and damages.

The case was tried to a jury. In closing argument, Ms. Payaslyan argued she was entitled to \$163,348.83 for past medical expenses, plus \$2,029,556.18 for future medical expenses, plus other expenses, for a total of \$2,675,696.16. Additionally, Ms. Payaslyan argued she was entitled to general damages (non-economic damages) of over \$20 million for pain and suffering. Mr. Payaslyan argued a chronic pain case was worth millions of dollars and he was entitled to \$3 million, as his life had been forever altered.

Robinsons-May did not argue Ms. Payaslyan was pain-free. Robinsons-May suggested Ms. Payaslyan was entitled to the medical expenses she had already incurred and damages for some additional treatment, perhaps in the total sum of \$372,000. Robinsons-May, however, asserted that the evidence showed that the claimed injuries and pain were exaggerated.

The jury found that Robinsons-May was the cause of injury to Ms. Payaslyan. The jury awarded Ms. Payaslyan \$535,000 in economic damages and \$100,000 in non-economic damages. The jury awarded Mr. Payaslyan \$10,000 in non-economic damages.¹

¹ The verdict form in its entirety reads:

“QUESTION No. 1:

“Was [Robinsons-May’s] negligence a cause of injury to the Plaintiff, Sylvia Payaslyan?

“Answer: [Yes.]

Judgment was entered.

The Payaslyans filed a motion for new trial contending the damage awards were inadequate. The trial court denied the motion.

The Payaslyans appealed from the judgment.

DISCUSSION

1. *The jury instruction regarding the present cash value of future economic loss does not mandate reversal.*

There was no testimony, expert or otherwise, discussing present cash value. Upon the submission of Robinsons-May, the jury was instructed with BAJI No. 14.70 stating that any finding of future economic loss must be for its present cash value. The instruction included a definition of present cash value, stated present cash value would be less than the amount found to be the loss of future benefits, and then stated that in the event the jury had the occasion to determine present cash value, *“there is handed to you a table the correctness of which the court takes judicial notice and from which you can*

“If you answer Question No. 1 ‘no’ as to [Robinsons-May], sign and return this verdict. If you answer Question No. 1 ‘yes’, then answer the next question.

“QUESTION No. 2:

“What do you find to be the total amount of damages, including economic and non-economic damages, if any, suffered by the plaintiffs caused by the accident involved herein?

“Answer: As to Sylvia Payaslyan

“(a) Economic Damages \$535,000.00

“(b) Non-Economic damages \$100,000.00

“As to [Varouzhan] Payaslyan

“Non-Economic Damages \$ 10,000.00”

*determine present cash value of losses by the following instructions printed thereon.”*² (Italics added.) The record on appeal contains BAJI No. 14.70, but does *not* contain a table.

The Payaslyans contend the omission of this table in the appellate record demonstrates the jury did not receive the table, was not provided with this tool to perform a present cash value calculation, and thus, reversal is required. This contention is not persuasive.

First, the Payaslyans are foreclosed from raising this argument. The Payaslyans did not object to BAJI No. 14.70. Rather, they argued that the language italicized above should be deleted and urged that no chart be submitted to the jury as it was only to be used for a “constant value.”³

² As given, BAJI No. 14.70 read in full: “Any finding of future economic loss must be only for its present cash value. [¶] Present cash value is the present sum of money which, together with the investment return thereon when invested so as to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts, and for the period that you find future benefits would have been received. [¶] The present case value will, of course, be less than the amount you find to be the loss of such future benefits. [¶] In the event you have occasion to determine the present cash value of future constant annual economic losses, *there is handed to you a table the correctness of which the court takes judicial notice and from which you can determine the present cash value of losses by following the instructions printed thereon.*” (Italics added.)

³ With regard to BAJI No. 14.70, the record reflects the following:

“[Trial court]: 14.70 It does need the paragraph that has been deleted by plaintiff that says that the present cash value table is attached. I can print it all.

“[Mr. Payaslyan’s counsel]: . . . The problem with giving a present cash value table, if you look at the use note in the appendix, it is for a constant value. For example, I owe you \$50,000 in ten years.

“[Trial court]: But you know what, it’s the best you get. You didn’t - - haven’t presented - - no economist was on the stand to say what discount factor he, she would be able to use. You’re stuck with the table.

Second, there was no expert evidence on present value and the instruction states that a table is not required. The instruction states that the jury “*can* determine present cash value” from the table. (Cf. *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613-614 (italics added) [no error in court’s refusal to give present cash value instruction when there was no expert evidence on present cash value; “There are ‘present cash value’ tables which *might* have assisted the jury in this regard . . . , but the proposed instruction included no reference to them.” (Italics added.)]; *Howard v. Global Marine, Inc.* (1972) 28 Cal.App.3d 809, 816 [trial court takes judicial notice of mathematical computation relating to present value, but not of table’s use and no table provided to jury; “we have found no California cases which hold that use of the present [cash value] table is indispensable to a proper award of damages for loss of future earning capacity”]; *Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 876-877 [no evidence as to how to calculate present value]; CACI No. 359 (2004), use note [in order to use tables, the discount rate must be established by stipulation or evidence, expert testimony is usually required].)

Third, the instruction stated that a table was attached and Mr. Payaslyan’s counsel discussed the concept of present value in closing statement and referred the jury to the economic table. Thus, as a practical matter, if the table was not attached to BAJI No. 14.70, and if the jury believed it was required to calculate present value, the jury

“[Mr. Payaslyan’s counsel]: . . . There is an objection for the record. I think that table is to be used where it is just a constant value

“[Trial court]: I understand, but there’s no evidence to the contrary that it isn’t that.

“[Ms. Payaslyan’s counsel]: And join in that.

“ . . .

“[Trial court]: I’m going to add the paragraph about the present cash value, and I’m going to add the table.”

would have requested further instruction prior to rendering its verdict. (Cf. *Howard v. Global Marine, Inc.*, *supra*, 28 Cal.App.3d 809 [trial court takes judicial notice of present value table, but refuses to furnish copy to the jury; after four hours of deliberation, jury asks for clarification].)

If the table was not submitted to the jury, its omission does not require reversal.

2. *The damages were not inadequate as a matter of law.*

The Payaslyans point to evidence they presented to argue the non-economic damages were inadequate, *as a matter of law*. In making this argument, they ignore the standard of review.

When considering a claim of insufficient evidence on appeal, we do not reweigh the evidence. Rather, we review the evidence in the light most favorable to the prevailing party, resolving all conflicts in the evidence favorable to the judgment. (*Estate of Beard* (1999) 71 Cal.App.4th 753, 778-779.)

The number of witnesses presenting evidence on a factual contest do not govern an outcome. The trier of fact is entitled to accept the testimony of one witness (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614) and discount that presented by interested witnesses. (*Ortzman v. Van Der Waal* (1952) 114 Cal.App.2d 167, 170-171; *Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, 1157-1158.)

There is no definite standard or method to calculate reasonable compensation for pain and suffering. (BAJI No. 14.13 (2004).) Spouses are entitled to reasonable compensation for loss of consortium. (BAJI No. 14.40 (2004); CACI No. 3920 (2004).) Calculating the amount of damages is a question for the jury. (*Abbott v. Taz Express* (1998) 67 Cal.App.4th 853, 857.) We do not question a damage award as long as it falls within reasonable range permitted by the evidence. (*Ibid.*) The jury can conclude a plaintiff is exaggerating. (E.g., *Lemere v. Safeway Stores, Inc.* (1951) 102 Cal.App.2d 712, 720-721.) Non-economic damage awards have been found inadequate as a matter of law when they are “so small compared to the nature and extent of the

injuries that it falls within the category of no damages at all.” (*Haskins v. Holmes* (1967) 252 Cal.App.2d 580, 586.)

Here, we cannot conclude that the non-economic damage awards constituted no damages at all when compared to the nature and extent of the injuries. The testimony of the defense expert, Dr. Varga, and the evidence introduced through the investigators and videotapes, undercut the premise of the Payaslyans’ case.

Dr. Varga concluded that Ms. Payaslyan exaggerated her pain and was malingering and there was a large discrepancy between the observed and reported behavior. He testified in part, “I felt that the discrepancy between what I saw in the video, . . . what I saw she could do versus what . . . she reported to me and what she reported in depositions and what her husband reported in his deposition, what was reported were really pretty significantly different. . . . Nobody is perfect, nobody remembers everything . . . [, b]ut when it’s consistent and the discrepancy is huge, . . . it’s hard to believe” Dr. Varga’s conclusion that there was a huge discrepancy between the observed behavior and the reported behavior was consistent with a comment by one of Ms. Payaslyan’s own physicians. Additionally, Ms. Payaslyan’s arm was not atrophied, as could be expected if she had RSD.

The video tapes showed Ms. Payaslyan using her left hand and arm for many normal activities, including closing a SUV door, driving, tying her son’s shoes, holding a cellular phone, holding a cane, and pushing a shopping cart. She was also seen working in one of the photography stores.

Thus, although the jury agreed that Ms. Payaslyan was injured and incurred medical expenses, it discounted her claims that she had concomitant pain, and rejected the claims that the injuries had caused extreme injuries. Rather, the jury believed the evidence that Ms. Payaslyan’s injuries were exaggerated and compensated her accordingly.

The \$100,000 in non-economic damages awarded to Ms. Payaslyan and the \$10,000 awarded to Mr. Payaslyan were not inadequate as a matter of law. They were within a reasonable range permitted by the evidence

DISPOSITION

The judgment is affirmed. Respondent Robinsons-May is awarded costs on appeal.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.